

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 03-632V

Filed: March 27, 2013

Not to be Published<sup>1</sup>

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ROBERT KRAKOW and  
LORI KRAKOW, parents of  
A.K., a minor,

Petitioners,

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

Respondent.

Interim Fees and Costs

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John F. McHugh, Esq., New York, NY, for petitioners.

Heather Pearlman, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

### DECISION AWARDING INTERIM COSTS

**Vowell**, Special Master:

On March 24, 2003, petitioners filed a Short-Form Autism Petition for Vaccine Compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”], on behalf of their son, A.K. In effect, the special “Short-Form” developed for use in the context of the Omnibus Autism Proceeding [“OAP”] alleges that various vaccinations injured A.K. On April 15, 2008, I

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

granted petitioners' request to withdraw from the OAP, and since that time petitioners have been working to prosecute an alternative theory.<sup>3</sup>

On February 28, 2011, petitioners filed an amended petition setting forth their theory of causation. I held a fact hearing on December 12, 2012. An entitlement hearing is scheduled for April 22-30, 2013.

#### **I. Petitioners' Motion for Interim Costs.**

On January 10, 2013, petitioners filed a motion for interim costs, seeking \$81,750.00 in expert witness fees and expenses they anticipate incurring in connection with the upcoming entitlement hearing. Petitioners' Motion at 1,11. In the motion, petitioners indicate they have already paid more than \$17,000.00 to obtain expert reports. *Id.* at 3.

Respondent filed a response on January 28, 2013, opposing petitioners' request. Respondent's Response at 1. Respondent argues that the Vaccine Act does not authorize an award of fees and costs until after entitlement has been determined. *Id.* at 2-7. Additionally, respondent asserts that petitioners have not shown these costs to be incurred or reasonable. *Id.* at 7-11.

On February 8, 2013, petitioners filed a reply. Along with their reply, petitioners filed several exhibits, including a declaration from petitioner Robert J. Krakow.<sup>4</sup> In his declaration, Mr. Krakow indicates petitioners "have expended more than \$17,000.00 in payments to various experts" and approximately \$5,000.00 in other costs for a total amount of \$22,000.00. Pet. Ex. 119 at 1-2.

On February 20, 2013, I ordered petitioners to file invoices for any costs paid, including any payments made to expert witnesses for work they already have performed by no later than Thursday, March 7, 2013. In response, petitioners filed a status report and Pet. Exs. 122 and 123 with attached receipts. On March 12, 2013, petitioners requested a status conference to discuss the status of their request for expert fees and costs.

I held a telephonic status conference with the parties on March 13, 2013. Heather Pearlman and Voris Johnson appeared on behalf of respondent. Mr. McHugh appeared on behalf of petitioners, and petitioner Robert Krakow was present on the call. During the call, Mr. McHugh and Mr. Krakow indicated petitioners would be able to proceed with their claim even if the only amounts awarded were for work already performed by petitioners' experts and costs already expended. Respondent's counsel

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<sup>3</sup> The extensive procedural history of this case is discussed at length in *Krakow v. Sec'y, HHS*, No. 03-632V, 2010 WL 5572074 (Fed. Cl. Spec. Mstr. Nov. 12, 2010) ["Order on Motion for Reconsideration"], and will only be repeated here where it is necessary to explain the instant decision.

<sup>4</sup> Mr. Krakow's declaration was filed as Petitioners' Exhibit ["Pet. Ex."] 119.

agreed they would not object to payments for some incurred expenses. Thus, I instructed the parties to continue their informal discussions and ordered respondent to file a status report, informing me if the parties had agreed upon an amount of interim costs and indicating any objections respondent may have to the amounts specified in petitioners' billing records filed on March 7, 2013.<sup>5</sup>

Respondent filed her status report on March 22, 2013, indicating that the parties were unable to come to an agreement. Respondent's Status Report at 1. Respondent listed specific objections to several of the amounts listed in petitioners' billing records. *Id.* Respondent informed me that she would not object to a payment of \$30,000.00, consisting of \$17,441.33 in costs and \$12,558.67 in attorney's fees for Mr. McHugh's work in 2010. *Id.* at 1-2.

Petitioners filed a status report later that same day, containing their proposed schedule of witness testimony for the upcoming entitlement hearing. See *infra* note 5. In the status report, petitioners argue they never sought interim attorneys' fees but only interim costs related to the upcoming entitlement hearing. Petitioners' Status Report at 1. Petitioners reiterated that payment of past expenses would be sufficient for them to proceed and provided additional documentation for the past expenses to which respondent objected. See Petitioners' Status Report at 2-4; Pet. Exs. 169-70, 210.

## **II. Award of Interim Costs.**

I grant in part and deny in part petitioners' motion, and I award interim costs as follows:

- (1) **\$16,312.50 for expert expenses:** This amount reflects the \$17,812.50 requested by petitioners minus a 50% reduction in the amount paid for Dr. Kinsbourne's expert report. Although I am paying the full amount requested for Dr. Megson's expert report, it is important to note that I am not agreeing to an hourly rate of \$400.<sup>6</sup> Instead, I am accepting petitioners' representation that Dr. Megson spent additional hours viewing videotapes and examining medical records. See Petitioners' Status Report, filed Mar. 22, 2013, at 2-3.
- (2) **\$7,795.62 for costs:** This amount reflects the full amount requested by petitioners. However, if the \$34.83 for office supplies is later shown to be

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<sup>5</sup> During the call, I also discussed the upcoming entitlement hearing and the need for a proposed schedule of witness testimony. I ordered petitioners to file a status report, giving me their proposed schedule.

<sup>6</sup> The records, including her expert report, reflect that Dr. Megson expended more than the five hours of work appearing on the invoice. Thus, I am confident that the \$2,000.00 requested for Dr. Megson's services is still equal to or less than the amount I would award, even if I were to determine, as did one of my colleagues that a \$400.00 hourly rate is not warranted. See *Doe 21 v. Sec'y, HHS*, 2011 WL 6941671 at \*7-8 (Fed. Cl. Spec. Mstr. Oct. 26, 2011).

overhead costs and therefore, not reimbursable, I will reduce the amount of any future costs claimed by this amount.

**Accordingly, I hereby award \$24,108.12 in the form of a check payable to petitioners, Robert and Lori Krakow, and petitioners' counsel, John F. McHugh, for petitioners' interim costs.**

The clerk of the court shall enter judgment, in accordance herewith.<sup>7</sup>

**IT IS SO ORDERED.**

**s/Denise K. Vowell**  
**Denise K. Vowell**  
Special Master

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<sup>7</sup> Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. See Vaccine Rule 11(a).